

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

74-2121

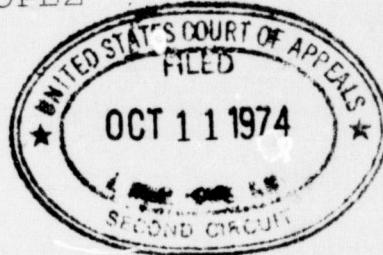
BPLS

74-2121

To Be Argued by:
FRANK A. LOPEZ

In The

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



THE UNITED STATES OF AMERICA,

Appellee,

-against-

FRITZ EMANUEL BASTIAN,

Defendant-Appellant.

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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THE UNITED STATES OF AMERICA,

Appellee,

-against-

Docket No. 74-2121

FRITZ EMANUEL BASTIAN,

Appellant.

-----x

APPELLANT'S BRIEF

Preliminary Statement

This is an appeal from a judgment of conviction entered against defendant appellant Fritz Emanuel Bastian¹ on the 2nd day of August, 1974, in the United States District Court for the Eastern District of New York (Platt, J.), sentencing him to concurrent terms of twelve (12) years each, after being found guilty of two counts of bank robbery after trial by jury.

Questions Presented

1. Is the use of a confession taken during a period following an illegal warrantless arrest and unlawful detention based upon the unsupported accusation of an undisclosed informer violative of appellant's Constitutional right to due process of law?

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Hereinafter referred to as "Bastian".

2. Is the use of a prosecution witness, who takes the Fifth Amendment when cross-examined violative of a defendant's Sixth Amendment right to confrontation and cross-examinations?

Statement of Facts

1. Suppression Hearing

At the Suppression Hearing, appellant moved to suppress the alleged oral and written inculpatory declarations made by him, two torn dollar bills and an identification as being obtained and resulting during the course of an illegal detention based on hearsay information furnished by an alleged undisclosed informer.

Bastian testified on his own behalf that he was arrested on January 9th, 1974, after having spent the night of January 8th in a rooming house in Arlington Terrace (9-10).² On January 9th, ill from the effects of narcotics, Bastian entered a grocery store to pawn his coat for a loan from Larry Coates, money he needed to purchase narcotics (11). He left the store and was followed by detectives driving in their car. When he reached a pool hall, the officers got out and ordered him to halt, with drawn pistols (14). The police questioned him about Larry and then took him handcuffed into their car (18). Shortly thereafter, Larry was also apprehended (11-20). They were brought to the 112th Precinct. Bastian was not told what he was there for other than they suspected Larry of some crime and wanted him to identify pictures (20). Finally, he was told that Larry was suspected of "several bank robberies in the area" and they wanted his cooperation (22). He identified both Larry and a man named Horace in the photographs shown to him (27). Throughout his detention, he was

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References are to the original record. Appellant's counsel was assigned under the C.J.A.

sick from his need for narcotics (29). He denied any knowledge of the Rockaway job, referring to the robbery of the National Bank of North America, the subject of this indictment (29). Danny O. Coulson, an F. B. I. agent arrived at the police station (30). He told Agent Coulson he participated in the Rockaway bank job. He made the statement only because of his illness and hope for medication, which admission Bastian claimed was false (31). Coulson told him what details to say (32-33). A detective told him to say Larry did the bank job with him, which he did, in order to secure medication (33-34). He was never advised of his "Miranda" rights (36). He did not recall reading the statement he signed (41). Bastian asserted his last shot of heroin was on January 8th, at 10:00 P.M. (45).

On cross-examination, he testified that a police officer told Agent Coulson he was suffering from withdrawal pains (48). On re-direct examination, appellant testified that he was promised medication for his cooperation (67).

F. B. I. Agent Danny Coulson testified that he was assigned the investigation of the December 12th, 1973, robbery of the National Bank of North America on Rockaway Boulevard (72-73). His information came from a confidential informant (76). Appellant's condition appeared to be normal when he observed him in a holding cell. No officer told him that Bastian was suffering from withdrawal pains (79). Bastian signed a waiver of rights form and then commenced to confess to the bank robbery (83).

Special Agent Robert M. McCartin was the next prosecution witness (110). He testified that he participated in the interrogation of Bastian but did not overhear any "Miranda" warnings given him, nor the confession he allegedly made (111).

He did not observe any withdrawal symptoms. A torn dollar bill taken from Bastian was an odd dollar bill from the robbery according to Bastian's alleged confession(116-7).

Coulson then returned to the witness stand for cross-examination. He testified that Bastian made a confession after being given notice of his "rights" (128). Bastian confessed that he robbed the bank with Larry Coates and others and that his share of the loot was some three thousand dollars (135). Appellant then signed a statement which was reduced to writing by F. B. I. Agent Coulson (136). When they divided the loot, they tore up dollar bills, each crime partner taking a portion for good luck (137). Coulson denied making any promises to Bastian (141). He showed a group of photographs to bank employees Ethel Jones and Leonard Silberman on April 19th, 1974 (141-2). Both witnesses picked out Bastian's photograph (143-5). Two victims of the robbery, however, could not make an identification (154).

Detective George Alleyne testified for the prosecution that on January 9th, 1974, he picked up Bastian and Larry Coates on information by telephone from a confidential informer that they were wanted for bank robbery (156-7). He invited Bastian into his car and handcuffed him (158). Bastian and Coates were driven to the 112th Precinct in Forest Hills, Queens. He mentioned the crime of which Bastian was a suspect (160). At the precinct Bastian was placed in a cell (161). The police officers began checking records for bank robberies to see if appellant could be connected to any of them (162). He never saw Bastian vomit, perspire, rock back and forth or stoop over in pain.

Detective Alleyne's testimony established that Bastian was illegally detained on the word of an undisclosed informer and nothing more (173):

- "Q. At that time did you charge him with any specific crime?
- A. No, I did not.
- Q. Did you ever charge him with any local or State crime?
- A. No, I did not.
- Q. You were holding him merely as a witness or something?
- A. As a suspect.
- Q. As a suspect, but he wasn't being arrested, is that correct?
- A. No."

The tip he received from the confidential informer was concerning the Bank of North America robbery (174-5). Until F.B.I. Agent Coulson arrived, Bastian did not confess and was not held on any specific charge (175-6). He was able to tell that Bastian was addicted to narcotics from his eyes, but his speech was normal and he was not sweating excessively (173).

Delphine Green, a New York City detective, was the next prosecution witness. He testified that on January 9th, 1974, he received a telephone call from a confidential informant that two individuals, wanted for bank robbery, were at a delicatessen located at 150th Street and South Road. One was named Larry and the other Fritz. He described their clothes (188). He identified the robbery as the one of the National Bank of North America (189).

The witness and his partner went to the scene of the tipoff and took the two suspects into custody (189). Bastian although an addict was not suffering from withdrawal pain (193). Information given by the confidential informant in the past lead to four arrests and three convictions (198; 209). Bastian was detained in the police station for the Federal Bureau of Investigation and was suspected of having committed a crime violative of both federal and state law-bank robbery according to Detective Greene (214).

Leonard Silverman, Assistant Manager of the National Bank of North America was the next prosecution witness. He testified that on December 12th, 1973, his bank was robbed. A man put a gun to his head (214). He made a courtroom identification of Bastian (226-7). On April 19th a Federal Bureau of Investigation agent showed him two spreads of six photographs each and he picked Bastian out of one selection (229-232). He failed, however, to identify Bastian out of a line-up (232). However, he explained that was because Bastian appeared shorter, having worn platforms at the time of the robbery and he had more hair then, an Afro and a goatee. He still was able to make a courtroom identification of Bastian (234). At the time of the robbery the witness noticed that Bastian was wearing platform shoes (235-6).

Ethel Jones, a bank teller at the National Bank of North America, testified that she saw a robber holding a gun to Mr. Silverman's head (262). She was forced to lie on her stomach from which position she could observe that the robber wore platform shoes (262-3). She saw the robber's face (264). She made a courtroom identification of Bastian as the robber (276-7). Photographs were shown to her and she viewed Bastian in a line-up. Both times, she identified him (277-8).

Both sides rested and the court made its findings that the confession obtained from Bastian was legally secured, the seizure of the torn dollar bills from him was also permissible and the identifications were not suggestive, nor impliedly made during a period of illegal detention.

2. The Trial

The first prosecution witness was Leonard Silverman, the Assistant Manager of the National Bank of North America. He testified that it was held up on December 12th, 1973 (310). A gun was put to his head and he was made to lie down on the floor near the teller's window (311). He identified Bastian as one of the robbers (312).

Ethel Jones, a teller in the employ of the bank, followed him to the witness stand. She, too, testified to a robbery that occurred on December 12th, 1973 (353). She made identifications of Bastian from pictures (357) and from a line-up. She then made a courtroom identification of Bastian (358).

Larry Derrick was the next witness. He testified that he had pleaded guilty to the bank robbery in issue (368) and was told that his maximum criminal exposure was twenty years. He was promised that he would not be indicted for two other bank robberies and a gun (369). He was also promised that State authorities would be advised of his cooperation for whatever value it might have on his pending State indictment for attempted murder (370-1). He admitted that he participated in the robbery of the National Bank of North America on December 12th, 1973, with Bastian and Coates (371). He then revealed that Danny Steele had planned the job, but was not present at the robbery itself and that Arthur Mitchell drove the getaway car (373-5).

On cross-examination, Derrick refused to answer the questions of defense counsel concerning the "Seven Crowns" gang and its criminal operations that bore on his credibility on Fifth Amendment grounds. Derrick's refusal was upheld by the court (419).

F.B.I. Agent Coulson was the next witness. He testified that he interviewed appellant on January 9th, 1974, at the 112th Precinct (427). He gave him notice of his Miranda warnings (428). Appellant then made a full confession (432). A search of Bastian produced two torn dollar bills that was part of the bank loot which was distributed among the participants for good luck (444-5).

POINT ONE

THE USE OF A CONFESSION OBTAINED DURING AN UNLAWFUL PERIOD OF DETENTION, RESULTING FROM A WARRANTLESS ARREST UPON THE UNSUPPORTED ACCUSATION OF AN UNDISCLOSED INFORMER IS VIOLATIVE OF THE FOURTH AND FOURTEENTH AMENDMENTS.

On December 12th, 1973, the National Bank of North America was robbed. On January 9th, 1974, a City Detective received a telephone call from an undisclosed informer that person named "Fritz" and one Larry had participated in the crime. The sources of the informer's information were not disclosed. Whether or not he was reliable is irrelevant, if the basis for his information was mere suspicion or underworld rumor. Nothing in the record indicates that it wasn't one or the other.

Acting on the unsupported say so of the undisclosed informer, two New York City detectives went out and arrested Bastian and Coates, merely because they were at the place mentioned by the informer and wearing the clothes he had described. The two men were taken to a police station where they were held for hours awaiting the arrival of F.B.I. agents. No charges were lodged against them and it is the testimony of Detective Alleyne that clearly establishes they were illegally detained on the barest of suspicion:

- "Q. At that time, did you charge him (Bastian) with any crime?
A. No, I did not.
Q. Did you ever charge him any local or State crime?
A. No, I did not.
Q. You were holding him merely as a witness or something?
A. As a suspect.
Q. As a suspect, but he wasn't being arrested; is that correct?
A. No." (173)

In Aguilar v. Texas, 378 U.S. 108 (1964) it was indicated that a suspect may not be arrested on the mere accusation of an undisclosed informer, even where a warrant has been issued without disclosure of the informer's sources of information:

"The mere conclusion that petitioner possessed narcotics. . . was that of an unidentified informant . . . It does not even contain an affirmative allegation that the. . . unidentified source spoke with personal knowledge. For all that appears the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not judge for himself the persuasiveness of the facts relied on... to show probable cause. He necessarily accepted without question the informant's suspicion, belief or mere conclusion. . . The magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were."

If a search may not legally be conducted under authority of a warrant issued upon the unsupported conclusions of an undisclosed informer, neither can a warrantless arrest be legally made on such unsupported information. Irrespective of the reliability of the informer, the police had no jurisdiction to undertake an arrest based upon an informant's mere say so. Just as a police officer may not make an arrest based upon his own surmise or suspicion without support, neither can he, upon the sumise and suspicion of an informer. Yet that is the only foundation for such drastic police action, that appears in this record as the basis for an arrest.

Given that the arrest and detention of appellant were unlawful, the question looms as to the consequent legality of a confession made by him during this critical period. The answer can be found in the cases. In McNabb v. United States, 318 U.S. 332 (1942) and Mallory v. United States, 354 U.S. 449 (1957), it was held that a confession secured during an undue delay in arraignment, as required by Rule 5(a) of the Federal Rules of Criminal Procedure taints a confession and bars its use

at trial. The gist of the decisions is that confessions secured during unlawful periods of detention are as excludable as any other type of tainted evidence.

In Wong Sun v. United States, 371 U.S. 471 (1963), a confession following an illegal arrest was held inadmissible. The Court went on to write:

"Whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

It does not require argument that the confession from appellant was drawn from him during the period of an illegal arrest. Indeed, but for it, he would not have been in a police station and there would have been no opportunity to interrogate him. Not only Bastian's confession, but the photographs taken of him that were shown to witnesses and identified, as well as the two torn dollar bills seized from his person, were equally excludable, since opportunity to obtain them was afforded by the illegal arrest.

The next issue is whether the use of this confession spelled out harmless error, in light of the co-conspirator testimony, eye witness identification and two torn half dollar bills used against appellant at trial. The answer is negative and reached by two distinct routes. The first is that most of the other evidence used against him was also tainted. The photographs taken of him, that began the process of identification, were taken during a period of unlawful detention. Davis v. Mississippi, 394 U.S. 721 (1969). So were the two torn dollar bills - proceeds of the bank robbery - that were seized from him during his unlawful period of detention on the unsupported accusation of the undisclosed informer. However, there is a second

reason why the doctrine of harmless error should not be applied to preserve this conviction. It can be found in *Chapman v. California*, 386 U.S. 213 (1967) which holds that the admission of an illegally secured confession can never be considered harmless error.

POINT TWO

THE USE OF A PROSECUTION WITNESS, WHO TAKES THE FIFTH AMENDMENT WHEN CROSS-EXAMINED VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION AND CROSS-EXAMINATION.

Larry Derrick, a participant in the bank robbery, testified for the Government accusing Bastian of having also perpetrated the crime. In warranting the veracity of his testimony, the Government also warranted that appellant would be afforded full opportunity to test the veracity of Derrick by cross-examination, which, of course included the vital issue of his credibility. The Sixth Amendment to the Constitution guarantees no less and any witness, unwilling to expose himself to an exhaustive character search, may not properly testify on behalf of the prosecution. There is no doubt that a witness whomever he might be has the right to take the Fifth Amendment, should his answer to a question tend to incriminate him. However, a defendant has the parallel right to full confrontation with his accusers which means uninhibited cross-examination. Any Government witness, who will not expose himself to a rigorous cross-examination, disqualifies himself as a witness. Otherwise, the witness' Fifth Amendment right to protection against self-incrimination is given

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- X

UNITED STATES OF AMERICA,

Appellee,

-against-

Docket No 74-2121

FRITZ EMANUEL BASTIAN,

Appellant.

----- X

STATE OF NEW YORK)
ss.:
COUNTY OF KINGS)

LEONARD FUSFIELD, being duly sworn, deposes and says:

That I am an attorney and counsellor at law, licensed to practice in the State of New York, with offices for this purpose at 31 Smith Street, Brooklyn, New York 11201.

That I am not a party to this action, am over 18 years of age and reside at 85 Livingston Street, Brooklyn, New York.

On October 10th, 1974, I served a true copy in duplicate of the Appellant's Brief in the above-entitled action by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the United States Post Service within the State of New York, addressed to the attorney for the appellee, the United States of America, as follows:

HON. DAVID G. TRAGER, Esq
Attention Joan S. O'Brien, Assistant U.S. Attorney
Office of the United States Attorney
225 Cadman Plaza East
Brooklyn, New York 11201.

Sworn to before me on October 10th, 1974.

Leonard Fusfield

FRANK A. LOPEZ
Notary Public, State of New York
No. 247596075
Qualified in Kings County March 30, 1976
Commission Expires March 30, 1978

FRANK A. LOPEZ • ATTORNEY AT LAW • 31 SMITH STREET • BROOKLYN, NEW YORK 11201

STATE OF NEW YORK, COUNTY OF

ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York State, and

certify that the annexed
has been compared by me with the original and found to be a true and complete copy thereof

say that: I am the attorney of record, or of counsel with the attorney(s) of record, for
I have read the annexed

know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged or
information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon
knowledge, is based upon the following:

The reason I make this affirmation instead of _____ is _____

I affirm that the foregoing statements are true under penalties of perjury.

Dated:

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF

ss:

being sworn says: I am

in the action herein; I have read the annexed
know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged or
information and belief, and as to those matters I believe them to be true.

the _____ of _____
a corporation, one of the parties to the action; I have read the annexed
know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged or
information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on _____, 19 _____

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF

ss:

being sworn says: I am not a party to the action, am over 18 years of
age and reside at _____

On _____, 19 _____, I served a true copy of the annexed
in the following manner:

by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service
within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

by delivering the same personally to the persons and at the addresses indicated below:

Sworn to before me on _____, 19 _____

(Print signer's name below signature)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

FRITZ EMANUEL BASTIAN,

Defendant-Appellant.

AFFIDAVIT OF SERVICE OF DUPLICATE COPIES OF APPELLANT'S BRIEF
UPON THE UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF
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To:

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated:

.....
Attorney(s) for

PLEASE TAKE NOTICE

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NOTICE OF ENTRY that the within is a (certified) true copy of a
entered in the office of the clerk of the within named court on

19

NOTICE OF SETTLEMENT that an Order of which the within is a true copy will be presented for settlement to the Hon.
one of the judges of the within named Court,
at
on

19

, at

M.

Dated:

FRANK A. LOPEZ
Attorney for

31 SMITH STREET
BROOKLYN, NEW YORK 11201

To:

Attorney(s) for

N 912 CL

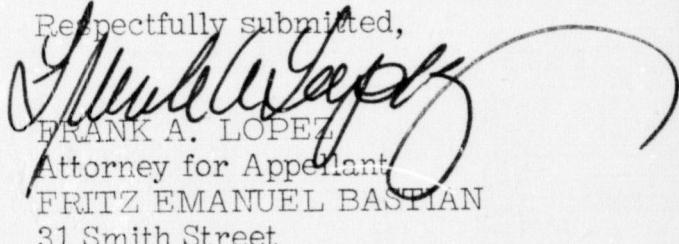
priority over an accused's right to confrontation and cross-examination of his accusers. There is no room for such priorities when the issue is guilt or innocence. The Government had a duty to learn whether its witness will invoke the Fifth Amendment and if so, to forego his testimony. The right to confrontation and cross-examination is too precious for compromise. Pointer v. Texas, 380 U.S. 400 (1966).

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE
REVERSED AND A NEW TRIAL ORDERED.

Dated: Brooklyn, New York, October 10th, 1974.

Respectfully submitted,


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